STATES vs. TERRITORIES.

A TRUE SOLUTION

OF THE

TERRITORIAL QUESTION.

BY AN

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STATES vs. TERRITORIES.

It may perhaps relieve, to some extent at least, the writer of this article from the charge of presumption in setting forth in a formal manner his views on the important subject of the Territories of the United States, when it is considered that his opinions formerly and at the present time have been considered of sufficient importance to be the subject of comment from very respectable persons, both in public speeches and the newspaper press.

It is certainly with no partisan purpose that this communication has been prepared, or is published; but the hope is, by a reference to the views and practice of the fathers, to aid in effecting a solution of this agitating and important question.

Although so much has recently been said and written in relation to the territorial governments of the United States, there is one view of the subject which has not, in my opinion, been as distinctly and prominently brought forward as it deserves to be.

The course which has been pursued by Congress from time to time since the adoption of the Federal Constitution, has been one of constant change and uncertainty. It has been governed by no uniform principle, and has been at all times and in every instance a manifest departure from those principles which formed the basis of the original cessions by the different States — from the views entertained by the members of the old Congress prior to the adoption of the Constitution — from the purposes and intentions of the members of the Convention which formed the Constitution — and from the manifest purport and entire scope, as well as the positive provisions of the Constitution itself.

It is manifest that these are the sources, not only to which we can best resort to learn the intentions of the early founders of the government and framers of the Constitution, but that they furnish the conclusive evidence on this subject. It is the present purpose, not only to show what were in fact the plans and purposes of the fathers, and that they were the wisest and best plans, but that these and these alone were in actual harmony with the

provisions of the Constitution, and that the instrument was framed in reference to them.

In order to avoid any misconception as to the views of the writer in relation to the *power* of Congress *under the existing state of things in the Territories of the United States*, he has no hesitation not only in admitting, but in contending that Congress possesses the power under the Constitution of legislating in relation to the territory of the United States, however acquired, whether by cession from the States themselves, by treaty from foreign powers, or by conquest. This power it possesses from the very nature of the case, and as one of the necessary incidents of the power of acquiring territory, which power must exist in any nation; and as a necessary result of this proposition, there cannot be any such thing as an *inherent sovereignty* in the people who may reside in a territory or tract of country belonging to the Federal government prior to the formation of a State. Nothing but the strongest party feeling and the most extreme opinions on an exciting subject could ever have led large bodies of men to adopt as political platforms the two contrary but most fallacious propositions — one that Congress possesses the power to pass laws to *exclude* slavery from a territory, but no power to admit it—and the other that Congress has the power alone of admitting and protecting, but not of excluding it. Without stopping to examine these two propositions, or either of them, which does not fall within the purpose of this article, it must be apparent to any fair and unprejudiced person that there can be no such limit to the *power* of legislation by Congress in relation to the Territories.

If it exists at all, it must be a general power; if to admit, it must also be to exclude slavery, and *vice versa*.

The foregoing views as to the *power* of Congress have been, until within a few years, not only the universal sentiment of the country, but fully sustained by the action of every department of the government. Every writer of distinction on the Constitution has laid down with more or less distinctness and force the doctrine of the power of legislation by Congress for the Territories. In addition to the decisions of the Supreme Court of the United States, which have been often cited, it is necessary now to cite only the very strong language of that Court in the opinion of the Court, given by the late Mr. Justice Daniel, in the very recent case of Miners' Bank *vs.* State of Iowa, (12 Howard, 7.)

"It seems to us that the control of these Territorial governments properly appertains to that branch of the government which

creates and can change or modify them to meet its views of public policy, viz: the Congress of the United States."

It has been thought proper, the more distinctly to present what is deemed the sound and unassailable view as to the *power* of Congress over the *Territories*, and not only to *admit* but to *insist* upon the existence of such power in Congress, because the purpose is to show that the true and wise *policy* of the government is to intrust the matters pertaining to their internal affairs to the local governments by whatever name they are called; that in no other way can the purpose and intention of the *fathers* of the country and the framers of the Constitution be carried out; and that the truest and most perfect remedy is furnished not only by imbibing the spirit of the founders of the government, but by adopting their very acts, and forming *States* instead of *Territories*. Indeed, the object of the present article is to show what were the views of all connected with the organization of the government, both in the Congress of the Confederation and the Convention which formed the Constitution; that the Constitution itself is in harmony with such views and plans; that the departure from their plain and simple policy has led to all our troubles, and that a return to those ancient paths would lead us to harmony and safety.

II. Before and at the time of the adoption of the Constitution of the United States, it was never in the contemplation of Congress to establish territorial governments in the manner and on the basis now adopted; but when any subdivision was to be made of the land or territory beyond the limits of the old States, the course which met the universal assent, and which was adopted, was the formation of "*new States*," without any intermediate territorial existence or pupilage — that these States should possess all the powers in their local affairs that all the other States possessed, should elect their own officers and enjoy all the attributes of sovereign States, but should not have the power of representation in Congress until they contained a specified number of inhabitants.

In the debates, resolutions, ordinances and acts of every kind of the old Congress, commencing in the year 1774 and continuing to the adoption of the Constitution of the United States in 1789, contained in the printed volumes of the Journals; and in the very full and accurate reports of the debates of the Convention which framed the Constitution, furnished by Mr. Madison, there is not one sentence or word which gives the least countenance to the idea of the formation of any such communities as are now organized under the name of Territories. The word "territory" is

occasionally used, but always in its ordinary sense, as a tract of land or region of country. On the contrary, the entire scope and purpose of the various resolutions, amendments and debates is, by implication at least, opposed to any such organizations or any similar organizations except as States.

First. The resolutions of the old Congress show clearly the view taken on this subject.

The resolution of the 10th of October, 1780, declared "That the unappropriated lands that may be ceded or relinquished to the United States by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States and be *settled and formed into distinct republican States, which shall become members of the Federal Union and have the same rights of sovereignty, freedom and independence as the other States*, that each State, which shall be so formed, shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit, &c." (6 Journals of old Congress, p. 213.)

On the 1st of May, 1782, a committee consisting (7 Journals, p. 367) of Messrs. Boudinot, Varnum, Jenifer, Smith and Livermore, to whom was committed a report on the cessions of New York, Virginia, Connecticut, &c., reported, recommending the adoption of the following among other resolutions:

"*Resolved*, That whenever the United States in Congress assembled shall find it for the good of the Union to permit new settlements on unappropriated lands, they will erect a *new State or States*, to be taken into the Federal Union in such manner that no one State so erected shall exceed the quantity of one hundred and thirty miles square, and that the same shall be laid out into townships of about six miles square."

"*Resolved*, That whenever *such new States* shall be erected, that the *bona fide* settlers within the same, at the time of the erection of such States, shall be confirmed in their respective titles to their reasonable settlements on the same terms as shall be allowed to other new settlers."

In relation to the cession by Virginia, of her western territory, there is much in the action of Congress bearing on this subject, but we confine ourselves only to the following:

On the 2d day of January, 1781, the Legislature of Virginia adopted a resolution, "that they would yield to the Congress of the United States for the benefit of said States, all right, title and

claim which the said Commonwealth hath north-west of the river Ohio upon the following conditions."

The first of these conditions was:—

"1. That the territory so ceded should be laid out and formed into States, containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit; and that the States so formed, should be distinct republican States, and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other States."

This act of the Legislature of Virginia having been referred to a committee of Messrs. Rutledge, Ellsworth, Bedford, Gorham and Madison, they made their report, which, on the 13th of September, 1783, was adopted by Congress with but one dissenting State. In this report the committee comment upon the different conditions, and in relation to this, the first, they say, "that the first condition is provided for by the act of Congress of the 10th of October, 1780," in part quoted above. (8 Journals old Cong. p. 258.)

And upon the 1st of March, 1784, (9 Journals of Cong. p. 47) the deed of cession of Virginia was presented to Congress and adopted by that body. In this deed one of the conditions of the grant which had been agreed to by Congress was the one above cited, and upon the express provision of which the cession was made.

On the 19th of the next month, (April 19, 1784,) "Congress took into consideration the report of the committee consisting of Mr. Jefferson, Mr. Chase and Mr. Howell, to whom was recommitted their report of a plan for a temporary government of the Western territory," (9 Journals, p. 98,) and after discussion and the adoption of various amendments, on the 23d of April adopted a very important provision for the government of the Western territory by a vote of every State except one, (9 Journals, p. 109–111.) This remained in force until the adoption of the celebrated ordinance of 1787.

The resolution commences as follows:—

"*Resolved*, That so much of the territory ceded or to be ceded by individual States to the United States, or is already purchased or shall be purchased of the Indian inhabitants, and offered for sale by Congress, shall be divided into distinct States, in the following manner, as nearly as such cessions will admit, that is to say, &c."

Then followed a description of the limits and boundaries of the States, and proceeds as follows:—

"That the settlers on any territory so purchased and offered for sale, shall, either on their own petition or the order of Congress, receive authority from them with appointments of time and place for their free males of full age within the limits of their State to meet together for the purpose of establishing a *temporary government*, to adopt the Constitution and laws of any one of the original States; so that such laws nevertheless shall be subject to alteration by their ordinary legislature; and to erect, subject to a like alteration, counties, townships or other divisions for the election of members for their legislature."

This is the provision for the first stage of a "temporary government" for the new State. The resolution then proceeds as follows:—

"That when any such State shall have acquired 20,000 free inhabitants, on giving due proof thereof to Congress, they shall receive from them authority, with appointments of time and place, to call a convention of representatives to establish a permanent government and constitution for themselves; provided, that both temporary and permanent governments be established on these principles as their basis."

"1st. That they shall forever remain a part of the United States of America."

"2d. That they shall be subject to the articles of Confederation in all those cases in which the original States shall be so subject, and to all the acts and ordinances of the United States in Congress assembled, conformably thereto."

"3d. That they in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."

"4th. That they shall be subject to pay a part of the Federal debt, contracted or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States."

"5th. That no tax shall be imposed on lands the property of the United States."

"6th. That their respective governments shall be republican."

"7th. That the lands of non-resident proprietors shall in no case be taxed higher than those of residents within any new State,

before the admission thereof to a vote by its delegates in Congress."

This was the second stage in the formation of the new States; and in order to show that these "new States" were, not only in the very terms of the act, invested with all the powers of the original States in the management of their internal affairs, but that it was the express purpose and intention of Congress so to invest them, we have but to refer to the previous action of Congress on this resolution.

The second of the above fundamental principles, as originally reported by the committee, was as follows: "*That they shall be subject to the government of the United States in Congress assembled*, and to the articles of Confederation, in all those cases in which the original States shall be so subject," &c.

On the 20th of April (9 Journal, p. 99) a motion was made by Mr. Sherman, seconded by Mr. Ellery, to strike out the words—"*to the government of the United States in Congress assembled, and.*"

On this question one State only voted against striking out, viz: Maryland, and three were divided. The words were stricken out, thus positively declaring that these new States in every stage should *not* be "subject to the government of the United States in Congress assembled."

The resolution then proceeds as follows, to provide for the *third* and *last stage* in the formation of these new States:

"That whenever any of the said States shall have, of free inhabitants, as many as shall then be in any one of the least numerous of the thirteen original States, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original States; provided the consent of so many States in Congress is first obtained, as may, at the time, be competent to such admission. And in order to adapt the said articles of Confederation to the state of Congress, when its numbers shall be thus increased, it shall be proposed to the legislatures of the States, originally parties thereto, to require the assent of two-thirds of the United States in Congress assembled, in all those cases wherein by the said articles the assent of nine States is now required, which being agreed to by them, shall be binding on the new States; until such admission by their delegates in Congress, any of the said States, after the establishment of their temporary government, shall have authority to keep a member in Congress, with the right of debating but not of voting."

The next clause in the resolution is as follows, viz:

"That measures not inconsistent with the principles of the Confederacy and necessary for the preservation of peace and good order among the settlers in any of the said new States, until they shall assume a temporary government as aforesaid, may from time to time be taken by the United States in Congress assembled."

The action of Congress in relation to this clause is very significant, and shows very clearly and precisely the views of Congress on this subject.

The entry in the Journal is as follows: (9 Journal, p. 108.)

"Congress resumed the consideration of the report of a committee on a plan for a temporary government of the Western territory."

A motion was made by Mr. Gerry, seconded by Mr. Williamson, to amend the report by "inserting after the words, 'but not of voting,' the following clause:"

[Here followed the above clause, which was adopted as a part of the resolution, which finally passed.]

"A motion was made by Mr. Read, seconded by Mr. Spaight, to postpone that amendment in order to take up the following:—

"That until such time as the settlers aforesaid shall have adopted the Constitution and laws of some one of the original States as aforesaid, for a temporary government, the said settlers shall be ruled by magistrates, to be appointed by the United States in Congress assembled, and under such laws and regulations as the United States in Congress assembled shall direct."

"On the question to postpone for the purpose aforesaid, the yeas and nays being required by Mr. Read," (but two States voted in the affirmative, and three were divided,) so the question was lost and the amendment of Mr. Gerry was adopted.

It thus clearly appears,

1. That none of the members—neither those in favor of Mr. Gerry's proposition, which was adopted, nor of Mr. Read's, which was rejected, were in favor of any control in the "new States" by Congress whatever after the very first stage of the "temporary government."

2. That it was only because it was "necessary," before the establishment of any local government, "for the preservation of peace and good order" that Congress should take "measures," &c.

3. And that this temporary authority by Congress should continue only "until they shall assume a temporary government," and shall then cease.

The resolution then concludes as follows, viz:—

"That the preceding articles shall be formed into a charter of compact; shall be duly executed by the President of the United States in Congress assembled, under his hand, and the seal of the United States; shall be promulgated and shall stand as fundamental constitutions between the thirteen original States, and each of the several States now newly described, unalterable from and after the sale of any part of the territory of such State, pursuant to this resolve, but by the joint consent of the United States in Congress assembled, and of the particular State within which such alteration is proposed to be made."

The portions of the ordinance of 1784, separately quoted above, embrace the entire provisions of that ordinance, except that part in which is described the limits and boundaries of the new States.

As the cession by Virginia had been completed before the adoption of this resolution, and as it remained in force until expressly repealed by the ordinance of 13th July, 1787, it was entirely competent for any body of men in any part of the territory defined and marked out for new States to have organized under its provisions, and if they had done so, they would to this day have been a State or States of the Union, with all the rights of the original thirteen States. That such organizations were not made, is doubtless owing to the fact that the population in the new country was very small and sparse.

In order further to show that it was the uniform and unchangeable purpose of the old Congress that "new *States*" should in the first instance be formed out of the newly acquired territory, reference may be had to the action of Congress in July, 1786.

After a full discussion and the adoption of amendments, it was resolved to recommend to Virginia to consent to revise its act of cession so as to change the boundaries, and to leave it to Congress to define from time to time the boundaries of the new States, and to fix the number of them. In these amendments, and in the resolution as finally adopted, these incipient organizations are uniformly spoken of as "*new States*," as "distinct republican *States*," "*which States* shall *hereafter* become members of the Federal Union, and shall have the same rights of sovereignty, freedom and independence as the original States," &c.

On the 7th of July, 1786, there is the following entry in the Journal, (11 Journal, p. 97):—

"Congress took into consideration a report of a grand committee, to whom, among other things, was referred a motion of Mr. Monroe, respecting the cession of Western territory and *forming*

the same into States, and the committee having submitted that it be resolved, 'That it be recommended to the States of Massachusetts and Virginia to take into consideration their acts of cession, and revise the same so far as to empower the United States in Congress assembled, to make such division into *States* of the *ceded lands and territory* as the situation of the country, and future circumstances may require; with this limitation and condition, however, that all the territory of the United States, lying North-west of the river Ohio shall be formed into a number of States, not less than two nor more than five, to be admitted into the Confederacy on the principles and in the forms heretofore established and provided.'"

A motion was made by Mr. Grayson to postpone the consideration of this report, in order to take up a substitute offered by him for this resolution. This substitute provided for a more particular description of the States to be formed, &c., but the motion did not prevail.

Other amendments were proposed, on which the yeas and nays were taken, and after the adoption of some of them, a preamble and resolution was finally adopted.

The preamble relates entirely to the size and boundaries of the States specified in the resolution of October, 1780, and in one of the conditions to the cession of Virginia and to the expediency of leaving to Congress to fix the boundaries of the new States, and closes as follows:—

"In order, therefore, that the ends of government may be attained, and that the States which shall be formed may become a speedy and sure accession of strength to the Confederacy, *Resolved*, That it be, and hereby is, recommended to the legislature of Virginia, to take into consideration their act of cession, and to revise the same, so far as to empower the United States in Congress assembled to make such a division of the territory of the United States lying northerly and westerly of the river Ohio into distinct republican States, not more than five, nor less than three, as the situation of that country and future circumstances may require; which States shall hereafter become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the original States, in conformity with the resolution of Congress of the 10th of October, 1780."

It was in relation to these questions, and at the very time when they were under discussion, that Mr. Jefferson wrote at length to Mr. Monroe, in a letter dated on the 9th July, 1786, and concludes as follows:—

"We had better, then, look forward and see what will be the probable course of things. This will surely be a division of that country into States of a small, or at most of a moderate size. If we lay them off in such they will acquiesce; and we shall have the advantage of arranging them so as to produce the best combinations of interest. What Congress have already done in this matter is an argument the more in favor of the revolt of those States against a different arrangement and of their acquiescence under a continuance of that. *Upon this plan we treat them as fellow citizens;* they will have a just share in their own government; they will love us and pride themselves in a union with us. Upon the other we treat them as subjects; we govern them and not they themselves; they will abhor us as masters, and break off from us in defiance. I confess to you that I can see no other turn that these two plans would take."

After the passage of this resolution, in July, 1786, there was no action in Congress on this subject, of any importance, until the 13th July, 1787, when "an ordinance for the government of the territory of the United States north-west of the Ohio river" was adopted.

With regard to this ordinance of 1787, it is manifest from the previous legislation, the action of Virginia and from the instrument itself, that it was designed as a temporary provision for an immense territory or tract of country, and evidently anticipated that the smaller subdivisions of that territory would be only under the organization of *States*. It was adopted from the necessity, or supposed necessity of the case, and evidently did not contemplate any such class of communities as now go under the name of *Territories*. Neither prior to that ordinance, nor in the ordinance itself, is that word once found with any such meaning, nor in all the debates or resolutions of Congress.

The ordinance provides that "the taxes for paying their proportion (of the debts and expenses of the government) shall be paid and levied by the authority and direction of the legislatures of the *district* or *districts*, or *new States*, as in the original States," &c.

"The legislatures of these *districts* or *new States* shall never interfere with the primary disposal of the soil," &c.

The 4th article provides that "there shall be formed in the said territory not less than three nor more than five States," and fixes the boundaries, reserving the right to alter them; but it is the boundaries of "*States*" that are so fixed; incipient and unorganized indeed, but still they were regarded as *States*, certainly not at

the time either providing for or contemplating the formation of any mongrel community called a Territory.

It was also expressly provided that, "whenever any of the *said States* shall have 60,000 free inhabitants therein, *such State* shall be admitted by its delegates, into the Congress of the United States on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent government and State Constitution," &c. Thus speaking of them and treating them as States *before* they shall have acquired the requisite population to entitle them to a representative in Congress.

The very ordinance fixes the boundaries of the new *States*, not to take effect at a remote period, but "as soon as Virginia shall alter her act of cession, and consent to the same."

This ordinance was based, as it must necessarily be, upon the conditions of the deed of cession of Virginia, which were agreed to by Congress. The first of these has been already quoted. It provided "that the *territory* so ceded should be laid out and formed into *States*, containing," &c., "and that the *States* so formed should be distinct republican *states*, and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other States."

The act of Virginia on this subject is as follows:—

"Whereas, the United States in Congress assembled did, on the seventh day of July, in the year of our Lord one thousand seven hundred and eighty-six, state certain reasons, showing that a division of the territory which had been ceded to the said United States by this Commonwealth, into States, in conformity to the terms of cession, should the same be adhered to, would be attended with many inconveniences, and did recommend a revision of the act of cession, so far as to empower Congress to make such a division of the said territory into distinct and republican States, not more than five nor less than three in number, as the situation of that country and future circumstances might require; and the said United States in Congress assembled have, in an ordinance for the government of the territory north-west of the river Ohio, passed on the thirteenth of July, one thousand seven hundred and eighty-seven, declared the following as one of the articles of compact between the original States and the people and States in the said territory, viz:"

[Here the 5th article of the compact of the ordinance of Congress of 13th July, 1787, which relates only to the number, boundaries and population of the new States is copied verbatim.]

"And it is expedient that this Commonwealth do assent to the proposed alteration, so as to ratify and confirm the said article of compact between the original States and the people and States in the said territory."

"2. Be it therefore enacted by the General Assembly, that the afore-recited article of compact between the original States and the people and States in the territory north-west of Ohio river, be, and the same is hereby ratified and confirmed, anything to the contrary, in the deed of cession of the said territory by this Commonwealth to the United States, notwithstanding."

III. The provisions of the Constitution of the United States are in perfect harmony in every respect with the previous and concurrent legislation of Congress, and are wholly inconsistent with the idea of any such political organizations as are now called Territories. No political organizations were contemplated or provided for except States.

The Convention that formed the Constitution commenced its session at Philadelphia on the 14th May, 1787, and closed its labors on the 17th September of the same year.

When it commenced its session the ordinance of 1784 was in full force, providing for the formation of States out of the territory ceded and to be ceded.

As has been already observed, it will be seen by a careful perusal of Mr. Madison's report of the acts and debates of the Convention, that not in one instance is the word territory used in reference to any organized political community but in its ordinary sense as a tract or region of country; and not only is the word not used, but no such organization as the modern one of territory is once referred to under any name. There is a very large number of provisions in the Constitution in relation to *States*, which are equally necessary for and equally applicable to the Territories as now organized, if any such organizations had ever been contemplated by the framers of the Constitution; but in all these cases States and States alone are mentioned, and no provision whatever is made in relation to territories or any other organized political body except States. Some of these will be mentioned.

In the 4th article it is provided that, "Full faith and credit shall be given *in each state* to the public acts, records and judicial proceedings of every other State."

And in the 2d section of the same article:—

"The citizens of *each state* shall be entitled to all privileges and immunities of citizens in the *several states*."

Again, with regard to the delivery of fugitives from justice, the same section provides:—

"A person charged *in any state* with treason, felony or other crime, who shall flee from justice, and be found in *another state*, shall, on demand of the executive authority of the *state* from which he fled, be delivered up, to be removed *to the state* having jurisdiction of the crime."

The same is the provision with regard to fugitives from labor and service in the same section:—

"No person held to service and labor in *one state*, under the laws thereof, escaping to *another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Again the 3d section provides for the formation of new States. The whole provision on this subject is as follows:

"New States may be admitted by the Congress into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress."

There is nothing in this provision which prevents the formation of new or incipient States, as provided for in the plan of Mr. Jefferson, in 1784, and which was in force for more than three years.

The Constitution also provides that the United States shall protect *each state* from invasion; that the Constitution and laws shall be the supreme law of the land, "and the judges in *every state* shall be bound thereby." The members of the *state* legislatures and the executive and judicial officers of the "*several states*" shall be bound by oath or affirmation to support the Constitution, &c.

Again, no provision whatever is made in the Constitution for the imposition or collection of direct taxes, except from the States alone. The provision is, "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers," &c.

And in the 6th amendment to the Constitution, which was proposed about the time of its adoption, it was provided:—

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *state and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law," &c.

In relation to the judicial power of the Union, it extends to

controversies between *two or more states;* between a *state* and citizens of another *state;* between citizens of different *states;* between citizens of the same *state*, claiming lands under grants of different *states*, and between a *state*, or the *citizens thereof*, and foreign states, citizens or subjects."

The difficulties arising from the omission of any provision for territories has led to a number of judicial decisions on the subject by the United States, and in some cases a remedy has been sought by legislation; as to some of them, however, there seems to be no remedy.

There is a recent case decided by the Supreme Court which may be quoted in illustration:—

Miners' Bank *vs.* State of Iowa. (12 Howard, 1, marginal note.) "Where a bank was chartered and its charter repealed by the legislature of a Territory, the question of the validity of the repealing act cannot be brought before this Court under the 25th section of the Judiciary Act."

"The power of review is confined by that section to certain laws passed by States, and does not extend to those passed by territorial legislatures."

Daniel, J., in opinion of Court, p. 7:—"If the question whether a writ of error would lie from this Court to review the acts of the territorial governments, could ever have been regarded as in any sense equivocal upon the language of the 25th section of the Judiciary Act, such a question could not now be considered as open, under the express adjudications previously ruled by this Court. Thus in the case of Scott *vs.* Jones, (5 Howard, p. 243,) it was expressly declared—

'That an objection to the validity of a statute on the ground that the legislature, which passed it, was not competent or duly organized, under the acts of Congress and the Constitution, so as to pass valid statutes, is not within the cases enumerated in the 25th section of the Judiciary Act, and therefore this Court has no jurisdiction over the subject. That in order to give this Court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a *state, a member of the Union*, and a public body owing obedience and conformity to its Constitution and laws. That if public bodies, not duly admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted power, such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the States or Territories within which

these bodies are situated and acting; but their measures are not examinable by this Court upon a writ of error. They are not *states* and cannot pass statutes within the meaning of the Judiciary Acts.' Other cases cited by the court, in the opinion just quoted, might be adduced to show the difference even taken by the Court in reference to its relation to the States as States, and as contra-distinguished from the Territories of the United States. It seems to us, that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy, viz: the Congress of the United States," &c.

It thus appears by the unanimous decision of the Supreme Court that in such a case as this there is no peaceable and judicial redress by the United States in case of a wrongful legislation by a Territory, "which might encroach on the Union or its granted powers," but that "such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting," &c.

In opposition to this weight of authority, the only provision in the Constitution on which this claim of authority, in relation to territories rests is in the 3d section of the 4th article, as follows:—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

This is the only instance in which the word *territory* is used in the Constitution, and a reference to the debates in the Convention clearly shows that the organization of any such political community or territory was never in the contemplation of the Convention. We refer to some of the most important points on this question:

On the 18th of August, 1787, (5 Elliott, p. 439,) "Mr. Madison submitted, in order to be referred to the Committee of Detail, the following powers as proper to be added to those of the general legislature:

"To dispose of the unoccupied lands of the United States."

"To institute temporary governments for new States arising therein."

These and other propositions of Mr. Madison were referred to a committee, of which Mr. Rutledge was chairman, who, on the 22d

of August, reported that in their opinion the following should be added, viz: (5 Elliott, 462.)

"At the end of the 16th clause of the 2d section of the seventh article: 'And to provide, as may become necessary from time to time, for the well-managing and securing the *common property* and general interests and welfare of the United States in such manner as shall not interfere with the government of individual States in matters which respect their internal police, or for which their individual authority may be competent.'"

This proposition was not embraced in the Constitution in the form presented by the committee, and nothing further is heard from it, but, by referring to the various speeches and amendments found in the 5 Elliott, from pages 492 to 497, it will be perfectly manifest that nothing was further from the thoughts of all the members of the Convention than the idea of giving to this word territory any other than the usual meaning of property or a tract of land.

From the foregoing it appears—

1. That in all the debates and resolutions of the old Congress the word territory is not used except as a description of property —public land—and that it was never in the contemplation of a single member of that body that any other political community should be organized out of the newly acquired territory except as States.

2. That immediately after the cession by Virginia of her western territory, an ordinance was adopted with great unanimity, for the organization of States in the newly acquired territory, and that which should be subsequently acquired, by the provisions of which the inhabitants within the limits prescribed in the resolution, might organize a State and adopt for their temporary government the Constitution of any one of the old States; when they attained to a population of 20,000, that they should adopt their own Constitution, and might send a delegate to Congress, who might debate but not vote, and when the population of the new State equaled that of the smallest of the original States, it was to be admitted into the Union on the same footing as the original States.

3. The States which were thus formed were in *every stage* to be sovereign in the management of their own affairs, and to adopt such a republican Constitution as they might deem expedient, without the control of Congress. And this ordinance continued in force as the law of the land from the 23d of April, 1784, until

the 13th of July, 1787, more than three years, when it was expressly, and in terms, repealed by the ordinance of that date.

4. That the ordinance of 1787 itself was merely a temporary provision for an immense unorganized territory, with but few inhabitants, and not only contemplated but provided for the organization of States within the territory or region to which the ordinance applied, and fixed the boundaries of such States, and recognized their existence as States before they should enjoy the full benefits of a representation in Congress, and be placed on "an equal footing with the original States in all respects whatever," by attaining to the requisite population of 60,000.

5. That in the record of the debates in the Convention for forming the Constitution of the United States, or the resolutions of that Convention, there is not to be found a single expression which countenances the idea of the organization of any communities like the present territorial governments or any other organizations except those of States. The word "*territory*," whenever it is used, is synonymous with a tract or region of country—public lands or public domain as now used, and never as a political society or organized community.

6. In the Constitution of the United States the word territory is but once used, and then in the usual sense of that term, as above stated, and throughout the whole instrument, *States* are alone mentioned, even when the provisions of the Constitution are in relation to subjects equally applicable to territories, if such organizations had been in the contemplation of Congress. The framers of that instrument evidently contemplated the organization of States alone. No provision is made for giving faith and credit to the public acts, records and judicial proceedings of any Territory in any other Territory or State, nor that the citizens of a Territory shall be entitled to all privileges or immunities in the several States. No provision is made in relation to fugitives from justice or from labor to or from a Territory—nor that the United States shall protect a Territory from invasion; nor that the judges of a Territory shall be bound by the Constitution and laws, nor take any oath to support the Constitution. No provision is made for direct taxes in the Territories. The judicial power of the Union is confined entirely to *States* and the residents of States, and all criminal prosecutions must be in the State and district in which the offense was committed. It is impossible to believe that if any other organizations except those of States were in view of Congress, that in all these and other cases they should have been wholly omitted.

Such were the views of the fathers of the government and the founders of the Constitution; and the inquiry arises whether experience has not shown that those views were wise, and their plan of governing the newly organized territory the best in itself, and the best adapted to, and most in harmony with, the provisions of the Constitution which was adopted in conformity with these views.

Is it not manifest that if the ordinance of 1784, introduced by Mr. Jefferson, adopted by the old Congress and continued in force for more than two years, were now re-enacted, that it would furnish the best solution of the vexed questions in relation to the territories?

If the same powers were conferred on these *new states* as were conferred by that ordinance, all questions as to "squatter sovereignty," "territorial sovereignty" and "non-intervention," and "Congressional intervention," would be settled at once and forever. All doubts or difficulties in relation to the return of fugitives from justice or fugitives from service from or to a territory would be solved; all questions in relation to the tenure of judicial office, the jurisdiction and powers of courts and judges, criminal and civil proceedings, and everything pertaining to the administration of justice under the Federal government in the territories would be at once settled in harmony with the spirit and purpose and in accordance with the actual provisions of the Constitution.

The numerous difficulties, incongruities and omissions, the various and conflicting decisions of courts, the interminable controversies as to political power, have all arisen from the organization of political communities which were never contemplated by the framers of the Constitution, are not embraced in its provisions, and the existence of which are wholly inconsistent with the entire scope and purpose of that instrument and with the fundamental principles of the government, of which that Constitution is the organic law.

If Congress were to adopt these general provisions and principles of the ordinance of 1784, the question arises, what would practically be the course to be pursued, and what would be the legislation required?

1. No more territorial governments would again be organized.
2. It would be the duty of Congress to fix the limits or boundaries of the future States.
3. Whenever, within the limits prescribed, there should be a population sufficient in numbers to require a local government

(say 20,000 inhabitants or some other number to be fixed in advance) the inhabitants of such incipient or new *state* to organize their own government and to have the privilege of sending a delegate to Congress with the power of debating but not of voting.

4. Whenever such new *state* should have a population which would, under existing laws, be sufficient to entitle them to a representative in the House of Representatives in Congress, such State should be admitted into the Union on an equal footing with the original States.

4. The new or incipient States in every stage of their existence should form their own Constitutions and pass their own laws, and have all the powers and attributes of the other States, except a representative in Congress.

With these general principles, the details in practice as to the mode of taking the census, the size and boundaries of the new States, the mode of calling the first Convention, &c., could, it is believed, without difficulty be arranged. Whether the system should or should not at once be applied to the existing organized territories, within their present limits or other limits, would be a question of expediency.

There would probably be no very serious difficulty in adopting the new system in all territory of the United States without the limits of the States. If, however, it might be thought inexpedient to adopt a too sudden and radical change at once, the system might more gradually be introduced of organizing from time to time new States instead of Territories, out of the existing territories, and the day would not be remote when there would not remain such an incongruous thing as a territorial government in the United States.

AN OLD LINE WHIG.

AUGUST 15, 1860.